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No. 80-11
IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION and BAYLESS, JEROME T. McHUGH, CHACE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC. J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, (NOW CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION, AND OXY PETROLEUM, INC.,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONSE OF PETITIONERS TO SUPPLEMENTAL BRIEFS OF RESPONDENTS

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Response of Petitioners to Supplemental Briefs of Respondents	1
POINT I	
Indian Tribes are not authorized to exercise governmental powers of taxation over non-Indians operating on the Reservation under Federal Authority	2
POINT II	
The historical relationship between a specific Indian Tribe and the United States is significant in determining the Tribe's present Rights and Powers	8
POINT III	
Congress evidenced an intent through the passage of 25 USC §398c to allow States to tax oil and gas produced on Executive Order Indian Lands and to compensate the Tribes through royalties	11
CONCLUSION	14
Special appendix (supplement and modification of List of Subsidiaries and Affiliates of Corporate Petitioners)	S-1
Appendix	A-1ff.

TABLE OF AUTHORITIES

Cases

	PAGE
Barta v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir.), cert. den. 358 U.S. 932 (1958)	6
British-American Oil Producing Co. v. *Board of Equalization*, 299 U.S. 159, reh. den. 299 U.S. 624 (1936)	9
Brown v. *Maryland*, 25 U.S. [12 Wheat.] 419 (1827)	5
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	12
Cherokee Nation v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890)	7
Commonwealth Edison Co. v. *Montana*, 450 U.S. . . . , 101 S. Ct. 2946, 69 L. Ed. 2d. 884 (1981)	2, 5
Crow Tribe of Indians v. *State of Montana*, 650 F. 2d 1104 (9th Cir. 1981)	12
McCulloch v. *Maryland*, 17 U.S. [4 Wheat.] 316 (1819)	5
Montana v. *United States*, 450 U.S. . . . , 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)	2, 3, 4, 6, 7, 8, 9
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	3, 9
St. Louis I. M. & S. R. Co. v. *United States*, 251 U.S. 198 (1920)	12
Sioux Tribe of Indians v. *United States*, 94 Ct. Cl. 150, *aff'd* 316 U.S. 317 (1942)	13
United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980)	9
United States v. *Wheeler*, 435 U.S. 313 (1978)	10
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)	8
Washington v. *Fishing Vessel Association*, 443 U.S. 658 (1979)	9

Statutes and Congressional Bills

	PAGE
25 USC § 232, 375, 416, 491, 589, 590c, 594, 609, 642, 648, 659, 668, 676, 690, 695, 749, 788, 882, 883, 898, 1087	9
25 USC § 319, 321	12
25 USC § 398c	9, 11, 12, 13
25 USC § 1271	9
S 876, S 1653, 68th Cong., 1st Sess. (1924)	11
66 Cong. Rec. 999 (1924)	11
66 Cong. Rec. 2799, 5433 (1925)	11
HR 9133, 69th Cong. 1st Sess. (1926)	11, 12
S 1722, 69th Cong. 1st Sess. (1926)	11
S 3159, 69th Cong. 1st Sess. (1926)	11
67 Cong. Rec. 10912, 10397 (1926)	11

Other

	PAGE
Choctaw and Chickashaw Permit Laws, 18 Op. Atty. Gen. 34 (1884)	5
Jicarilla Apache Tribes' Motion to Dismiss, Conoco v. Andrus, No. 80-261-C (D.N.M.)	5
Memorandum of the Solicitor to the Commissioner of Indian Affairs, June 3, 1941	5
Official Mexican Attitudes Toward the Indians: An Historical Essay, 54 Tul. L.R. 964 (1980)	7
Regulation of Traders on the Navajo Reservation, 60 I.D. 176 (1948)	5
Right of the Cherokees to Impose Taxes on Traders, 1 Op. Atty. Gen. 645 (1824)	5
Tenth Circuit Survey: Lands and Natural Resources, 58 Den. L. J. 415 (1981)	12
Transcript of Hearing, Southland Royalty Company v. Navajo Tribe, C-79-140 (D. Utah 1980), Argument on behalf of the Department of the Interior	5

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Respondents.

RESPONSE OF PETITIONERS TO SUPPLEMENTAL BRIEFS OF RESPONDENTS

[1] The parents, subsidiaries and affiliates of corporate petitioners are shown in the Special Appendix previously filed, as supplemented and modified by the Special Appendix hereto.

Petitioners file this response to the supplemental briefs filed by the Acting Solicitor General on behalf of the Secretary of the Interior and by the Jicarilla Apache Tribe.

POINT I

INDIAN TRIBES ARE NOT AUTHORIZED TO EXERCISE GOVERNMENTAL POWERS OF TAXATION OVER NON-INDIANS OPERATING ON THE RESERVATION UNDER FEDERAL AUTHORITY.

The Acting solicitor maintains that *Montana* v. *United States*, 450 U.S. . . . ., 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) and *Commonwealth Edison Co.* v. *Montana*, 450 U.S. . . . ., 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) "reject at least some of the challenges previously interposed to the tribal tax under review." (Act.Sol.Supp.Br., p. 2) Petitioners disagree and would suggest that these cases reinforce the basic premise that Indians do not possess sufficient "inherent sovereignty" to exercise coercive governmental authority over non-Indians.

The Acting Solicitor maintains that *Montana* v. *United States* "seems to confirm tribal authority to tax non-Indians doing business within a reservation in circumstances like those presented here." (Act.Sol.Supp.Br., p. 2, n.1) Petitioners believe that *Montana* v. *United States* directly refutes the proposition that Indian tribes retain governmental authority over the territorial limits of their reservation and clearly holds that such tribes may "tax" non-Indians only under specific Congressionally delegated authority, proprietary rights or within "consensual relationships."[2] In considering the issue of whether the Crow Tribe or the State of Montana held title to the bed of the Bighorn River, the Court specifically referred to the ownership claims of both the State and the United States as deriving from their "governmental sovereignty":

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[2] 450 U.S. . . ., 101 S.Ct. at 1258, 67 L.Ed.2d at 510.

> As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when *they enter the Union and assume sovereignty* on an 'equal footing' with the established States. . . . But because control over the property underlying navigable rivers is so strongly identified with the *sovereign power of government, United States* v. *Oregon, supra,* 295 U.S. at 14, it will not be held that the United States has conveyed such land 'except because of some special duty or exigency' 450 U.S. . . . , 101 S.Ct. at 1251, 67 L.Ed.2d at 501-2. (emphasis added)

At the outset, however, the *Montana* Court made it clear that it did not view Indian tribes as possessing governmental status even remotely analogous to that of a State. Justice Stewart, writing for the Court, pointed out that, "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." 450 U.S. . . . , 101 S.Ct. at 1257, 67 L.Ed.2d at 509. He noted that although Indian tribes retain the power to prescribe and enforce internal laws which involve only *the relations among members of a tribe,* "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe.* . . ." 450 U.S. . . . , 101 S.Ct. at 1257, 67 L.Ed.2d at 509 (emphasis by the Court.)

Justice Stewart reasoned that, since *Oliphant* v. *Suquamish Tribe,* 435 U.S. 191 (1978) held Indian tribes cannot impose criminal sanctions against non-Indians, such tribes are divested of the power to adopt regulations which rely upon coercive sanctions against non-Indians.[3] He stated that there was no logical distinction between the divestiture of tribal criminal and civil jurisdiction over non-Indians:

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[3] 450 U.S. . . . , 101 S.Ct. at 1258, 67 L.Ed.2d at 510, n. 14. This is also one of the infirmites of the Jicarilla Tax, see discussion, Merrion Brief In Chief, p. 40.

> Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher* v. *Peck*, 6 Cranch 87, 3 L.Ed 162 — the first Indian case to reach this Court — that the Indian tribes have lost 'any right of governing every person within their limits except themselves.' *Id.*, at 147, *Oliphant* v. *Suquamish Indian Tribe, supra*, 435 U.S. at 209. Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that *the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe*. 450 U.S. 101 S.Ct. at 1258, 67 L.Ed.2d at 510 (emphasis added).

Rather than confirming tribal authority to tax non-Indians, then, the Court in *Montana* clearly recognized the applicability of the total governmental framework created and limited by the United States Constitution; and the lack of any recognition of tribal governmental sovereignty therein.[4]

While the Acting Solicitor admits the Constitution does not recognize Indian tribes as governmental entities,[5] he argues that "surviving Indian prerogatives (like the taxing power) which are not mentioned in any statute are, as against all but the United State itself, 'constitutional rights' in the same sense as that term is customarily applied to other privileges secured against abridgement by one government or another."[6] In essence, the argument is that although the Constitution does not recognize or restrict the use of governmental power by Indian tribes, tribes should nevertheless have the jurisdiction of constitutionally recognized government.[7] The Acting Solicitor makes this argument in spite

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[4] See Merrion Brief-in-Chief, p. 7-12; Amicus Brief of the Salt River Project Agricultural and Power District, pp. 4-7.

[5] Act.Sol.Supp.Br., pp. 6-7, n.2.

[6] Act.Sol.Supp.Br., p. 7, n.2.

[7] Although the Deputy Solicitor argued that tribal taxes will not be used to exploit non-Indians because they must be approved by the

of the fact non-Indians are expressly precluded from any participation in any tribal organizations.[8] Indeed, adoption of the potentially coercive tribal civil authority urged by the Acting Solicitor would allow Indian tribes to deprive non-Indians of the very civil rights he is so solicitous of protecting. (Act. Sol.Supp.Br., p. 6)[9]

Secretary of the Interior, (Oral Argument Tr. 41) the Interior Department has previously argued it has no authority to, and will not, review tribal taxes imposed on non-Indians. *Southland Royalty Company* v. *Navajo Tribe*, C 79-140 (D. Utah), appeals pending No. 80-2035 *et seq.* (10th Cir. 1980); Tr. March 13, 1980 pp. 70-73, appended hereto, Appendix A-1 *ff.* Moreover, the Jicarillas themselves have repeatedly argued that if the Secretary makes a decision which affects the Tribe, such decision is not subject to judicial review since the Tribe is an indispensable party and, because of its claimed sovereign immunity, cannot be sued. See, *e.g.*, Jicarilla Motion to Dismiss, *Conoco* v. *Andrus*, No. 80-261 C (D.N.M.) appended hereto, Appendix, A-5 *ff.* Even if the Secretary were inclined to restrain tribal taxation, however, this Court long ago rejected mere promises that local taxation would never be abused. *Brown* v. *Maryland*, 25 U.S. [12 Wheat.] 419, 439 (1827). Indeed, as Chief Justice Marshall observed, "the power of taxation is not confined to the people or property of a state. It may be exercised upon every object brought within its jurisdiction [and] to the utmost extent to which the government may choose to carry it." *McCulloch* v. *Maryland*, 17 U.S. [4 Wheat.] 316, 429, 428 (1819). *Cf.*, *Commonwealth Edison Co.* v. *Montana*, 450 U.S. . . ., 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981).

[8] For further discussion of the Constitutional implications of this restriction on participation in tribal affairs, see the dissent of Chief Judge Seth below, (J.A. 169); Merrion Brief In Chief, pp. 35-41.

[9] Moreover, this argument is contrary to a long line of legal opinions from the Executive Branch that, because of their dependent status, Indian tribes do not have the power to tax non-Indians operating on an Indian reservation with federal approval. *Right of the Cherokees to Impose Taxes on Traders*, 1 Op. Atty. Gen. 645, (1824); *Memorandum of the Solicitor to the Commissioner of Indian Affairs*, June 3, 1941; *Choctaw and Chickasaw Permit Laws*, 18 Op. Atty. Gen. 34 (1884). *Cf.*, *Regulation of Traders on the Navajo Reservation*, 60 I.D. 176 (1948).

The Jicarilla position herein provides a good example of the potential abuse of the taxation power, by a "sovereign" unlimited by Constitutional restraints. The only restriction the Jicarilla Tribe recognizes on tribal taxation is that it apply to activities actually being conducted by non-Indians since it obviously would be "futile for the Tribe to levy a manufacturer's excise tax, if there is no manufacturing on the reservation". (Jic.Supp.Br., p.8) The Tribe compares its sovereignty to that of the state and federal governments (*Id.* pp. 9-10) but refuses to accept the Constitutional limits that restrain those governments.[10]

However, in *Montana* v. *United States*, 450 U.S. . . ., 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), this Court again recognized that Indian tribes could exercise "sovereignty" over non-Indians in only three situations: (1) where Congress had expressly delegated federal authority to the tribe (2) as a proprietary right and (3) when non-Indians had expressly consented to such tribal "sovereignty."

In *Montana*, Justice Stewart gave several specific examples of situations in which Indian tribes could exercise "sovereignty" over non-Indians when Congress had expressly delegated them such authority. 450 U.S. . . ., 101 S.Ct. at 1258, 67 L.Ed.2d at 509-10. He noted the Allotment Act, by which the non-Indians obtained the right to enter the Crow Reservation, contained no delegation of governmental authority to regulate non-Indians:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal

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[10] The lack of Constitutional restraints on tribal taxation was also recognized in a case relied upon heavily by the Jicarilla Apache Tribe, *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir.), cert. den. 358 U.S. 932 (1958).

> regulatory authority. 450 U.S. . . ., 101 S.Ct. at 1255, 67 L.Ed.2d at 507, n. 9.[11]

The *Montana* case also reaffirmed that Indian tribes, like other property owners, have certain proprietary powers. These cannot, however, be extended to create coercive governmental authority over outsiders.[12] Quoting from a Congressional report, Justice Stewart emphasized that such proprietary powers are not the same as governmental sovereignty:

> "Indian property owners should have the same protection as other property owners, [sic], for example, a private hunting club may keep non-members off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity." 450 U.S. . . ., 101 S.Ct. 1256, 67 L.Ed.2d at 508, n. 11.

Justice Stewart recognized, however, that non-members who had federally sanctioned property interests could not be subjected to tribal regulations, 450 U.S. . . ., 101 S.Ct. at 1257, 67 L.Ed.2d at 508-9. Clearly Petitioners, who have federally sanctioned leases, cannot be subjected to the Jicarilla tax as condition to their continued operation on the Reservation.

The *Montana* Court then considered the third foundation of tribal power over non-Indians, "consensual relationships:"

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[11] Rather than claiming delegated authority, the Jicarilla Tribe is arguing that the Interior Department has failed to protect "tribal" resources. (Jic.Supp.Br., pp. 1-4) and it must therefore act independently of the federal government.

[12] 450 U.S. . . ., 101 S.Ct. 15 1253, 67 L.Ed.2d at 505, see also *Cherokee Nation* v *Southern Kansas Railway Co.*, 135 U.S. 641 (1890). Application of this rule to the Jicarilla Apache Tribe which had not exercised governmental sovereignty over their territory prior to the time it was annexed to the United States under the Treaty of Guadalupe Hildalgo is particularly appropriate. See Merrion Brief in Chief, pp. 22-23; *Official Mexican Attitudes Toward the Indians; An Historical Essay*, 54 Tul. L.R. 964 (1980).

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. 450 U.S. . . ., 101 S.Ct. at 1258, 67 L.Ed.2d at 510.

In finding that tribes have the power to regulate non-Indians through consensual relationships, it is significant that *Montana* v. *United States* relied upon *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). The *Colville* case considered tribal taxation in the context of the classic "consensual relation." If non-Indians wished to purchase cigarettes on the Indian reservations, they were required to pay the tribal "tax." Non-Indians, even those living on the reservation, wishing to avoid the tribal tax could merely "travel elsewhere" to purchase their cigarettes.[13]

Petitioners have never denied that the Jicarilla Tribe is entitled to regulate reservation activities by non-Indians through any means which are contractually acceptable to both parties. Petitioners did not, however, consent to the Jicarilla Tribe changing the contractual rate of royalties by imposing a "severance tax." Indeed, Petitioners have consistently maintained the Tribal "tax" is really a unilateral increase in royalties, prohibited by both the leases and federal law.[14]

POINT II

THE HISTORICAL RELATIONSHIP BETWEEN A SPECIFIC INDIAN TRIBE AND THE UNITED STATES IS

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[13] 447 U.S. at 158. As in the *Montana* case, the Court in *Colville* also expressly recognized that the relevant treaties could "be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter . . ." 447 U.S. at 156.

[14] Merrion Brief in Chief, pp. 26, 33. Indeed the Jicarilla Tribe now admits it adopted the Severance Tax only after it was unable to force the Interior Department to seek additional royalties (Jic.Supp.Br., pp. 4-5)

SIGNIFICANT IN DETERMINING THE TRIBE'S PRESENT RIGHTS AND POWERS.

The Acting Solicitor's contention that Congress and this Court have treated Indian tribes uniformly in spite of their historical origins or the nature of their treaty compacts with the United States is inaccurate.[15] A review of Title 25 of the United States Code indicates that Congress very rarely promulgates laws which apply universally to all Indian tribes.[16] Furthermore, it is clear that Congress has specifically recognized a distinction between those reservations created by Executive Orders, and those created by treaty with regard to taxation of oil and gas production.[17] *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159, reh. den. 299 U.S. 624 (1936).

Like Congress, this Court has considered the historical origins of each tribe's relation to the federal government at length prior to attempting to determine the specific powers possessed by that tribe.[18] Such an analysis is clearly necessary to determine the first two foundations of tribal "sovereignty", to-wit: (a) the nature and extent of any federally delegated power and (b) the extent of that tribe's proprietary rights.

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[15] Act.Sol.Supp.Br., pp.3-5. Indeed the Jicarilla Tribe now attempts to use its own unique historical relationship to argue that its tax is justified on the basis that the Secretary of the Interior has breached his obligation to the Tribe. Jic.Supp.Br., p.5.

[16] See e.g. 25 USC § 232, 375, 416, 491, 589, 590c, 594, 609, 642, 648, 659, 668, 676, 690, 695, 749, 788, 882, 883, 898, 1087. Indeed, in least one area, Congress has adopted a special statutory plan just for the Jicarilla Apache Tribe. 25 USC § 1271.

[17] See 25 USC § 398c.

[18] See, *e.g.*, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Washington* v. *Fishing Vessel Association*, 443 U.S. 658 (1979). Indeed the *Montana* opinion distinguished between the Choctaw and Crow Tribes with regard to state jurisdiction over the beds of navigable rivers located on their reservations, on the basis of their proprietary powers as recognized by their various treaties. 450 US . . ., 101 S.Ct. at 1253, 67 L.Ed.2d at 504, n. 5.

The Acting Solicitor next claims that there can be no distinction between the powers and rights of an Executive Order tribe and those of a treaty tribe since "the governmental powers of Indian Tribes, for the most part, are not derived from a federal delegation, but represent the residuum of aboriginal sovereignty." (Act.Sol.Supp.Br., p. 3) In support of this proposition, the Acting Solicitor cites *United States* v. *Wheeler*, 435 U.S. 313 (1978). In *Wheeler*, the Court held that an Indian tribe had the right to impose criminal sanctions on tribal *members* for crimes committed on the reservation. This case does involve the question of whether Indian tribes have some internal authority in matters relating to relations between tribal members. As the *Wheeler* opinion recognized however, "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non members of the tribe." 435 U.S. at 326. Petitioners agree with the Acting Solicitor that this "divesture of sovereignty ... between an Indian tribe and non members of the tribe" should apply equally to Executive Order and treaty tribes.

The Acting Solicitor constructs an elaborate straw man based on the premise that the Jicarilla Apache Tribe has not lost its power to tax non-Indians through its failure to exercise this asserted power until 1976. (Act.Sol.Supp.Br., pp. 5-12) This argument misses the mark entirely. Petitioners do not argue that the Jicarillas lost tribal power by failure to exercise it, but rather that they never had any such power. The fact that the Jicarilla Tribe never attempted to impose taxation prior to 1976 is significant because it indicates that prior to that period, it never occurred to the Tribe, or anyone else, that it had any such power.[19]

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[19] The Jicarilla's failure to attempt taxation, even though their counsel asserts that they have exercised tribal sovereignty since 1849 and the "inherent tribal power to tax" was clearly upheld as early as 1905 (Jic.Br. pp. 13-14; Act.Sol.Supp.Br., p. 9), indicates that the Jicarilla "severance tax" is a direct attempt to profit from the energy crisis. As oil and gas prices have risen, Jicarilla revenue based thereon has risen proportionally. Contrary to representations

POINT III

CONGRESS EVIDENCED AN INTENT THROUGH THE PASSAGE OF 25 USC § 398c TO ALLOW STATES TO TAX OIL AND GAS PRODUCED ON EXECUTIVE ORDER INDIAN LANDS AND TO COMPENSATE THE TRIBES THROUGH ROYALTIES.

Petitioners have outlined the history of Congressional compromise on 25 USC. § 398c at length.[20] The Acting Solicitor, mistakenly, argues, "allowing State taxation of the *lessee's* interest was never a contested issue. Every proposal included that feature, and no one suggested that this pre-empted tribal taxation." (Act.Sol.Supp.Br., p. 12) In fact, taxation of the lessee's interest was a hotly contested issue and several versions of this statute did not include "that feature"![21]

The Acting Solicitor also contends that in 1927 Congress was not aware of "the tribal prerogative now asserted." (Act. Sol.Supp.Br., p. 10) This contradicts the earlier assertions of both the Tribe and the Solicitor that Tribes have always had the power to tax non-Indians and that such power was widely recognized by the courts before the turn of the century.[22] The argument also ignores the fact that prior to 1927 Congress had specifically delegated authority in 1904 to collect taxes from

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at oral argument that the Tribe was locked into leases "issued in 1953 when conditions were quite different from the conditions prevailing at this time" (oral argument, Tr. 27), the Jicarilla share in each of these leases is based on a percentage, ranging from 12½ to 50%, of the value of the oil and gas produced. This is in addition to the substantial bonuses and rentals paid by Petitioners.

[20] See Merrion Brief in Chief, pp. 29-35, Merrion Reply Br., pp. 14-17, Amoco Brief in Chief, pp. 16-23. See also, the Dissenting Opinion of Judge Barrett below (J.A. 186).

[21] S 876, S 1653, 68th Cong., 1st Sess. (1924); 66 Cong. Rec. 999 (1924); 66 Cong. Rec. 2799, 5433 (1925); HR 9133, 69th Cong. 1st Sess. (1926); S 1722, 69th Cong. 1st Sess. (1926); S 3159, 69th Cong. 1st Sess. (1926); 67 Cong. Rec. 10912, 10397 (1926).

[22] Jic.Supp.Br., p. 13; Act. Sol.Supp.Br., pp. 9-12.

grantees of rights-of-way on Indian reservations when it felt it was appropriate. 25 USC §319, §321. The argument is likewise inconsistent with the long settled doctrine that in adopting legislation, Congress may be presumed to be aware of "the legal status quo." *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *St. Louis, I.M. & S.R. Co.* v. *United States*, 251 U.S. 198, 207 (1920).

The Acting Solicitor's assertion that, "The division of the Tribe's royalties obviously has no effect on the taxation of the lessee's quite separate interest",[23] is contrary to economic fact. Insofar as the Tribe and the State have to divide the total revenue produced from oil and gas production, and production will be continued only insofar as it is economic, an increase in taxation or royalty by either the State or the Tribe may have a repressive effect upon continued production and ultimately upon the toal revenue of either or both entities.[24]

Indeed, this argument demonstrates that the Acting Solicitor misses the significance of 25 USC §398(c) entirely. This statute is evidence that with regard to Executive Order Reservations, (1) Congress did not delegate Indian tribes any power to tax oil and gas production and (2) Congress recognized such tribes did

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[23] Act.Sol.Supp.Br., p. 12.

[24] For a further discussion of the negative impact of tribal taxation on state revenues, see Amicus Brief filed by New Mexico, North Dakota, Utah and Wyoming; *Crow Tribe of Indians* v. *State of Montana*, 650 F.2d 1104 (9th Cir. 1981). This problem was specifically recognized by Congress during the debate on 25 USC 398c, Hearings before Subcommittee of the Committee on Indian Affairs on H.R. 9133, pp. 26-8, 69th Cong., 1st Sess. (1926). The fallacy of this position was also recognized in *Tenth Circuit Survey: Lands and Natural Resources*, 58 Den. L. J. 415, 422 (1981).

not possess any power based on their proprietary interest.[25] The provisions of 25 USC §398(c) illustrate that Congress intended to authorize the States, not the Tribes, to obtain governmental revenues via taxation of oil and gas production.

[25] The existence of a tribal proprietary interest in Executive Order Reservations is indeed doubtful, as even the Acting Solicitor recognizes. Act.Sol.Br. p. 3. There is a serious question regarding the President's authority unilaterally to create an Indian Reservation without consulting Congress. *Sioux Tribe of Indians* v. *U.S.*, 94 Ct. Cl. 150, *aff'd* 316 U.S. 317 (1942).

CONCLUSION

For the foregoing reasons and for the reasons set forth in Petitioners' brief on the merits and in the Petition for Writ of Certiorari in cause No. 80-11, the opinion of the Court of Appeals for the Tenth Circuit should be reversed, and the Jicarilla Apache Tribe severance tax ordinance should be declared unlawful and void.

Dated: 21 October, 1981 A.D.

Respectively submitted,

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SPECIAL APPENDIX

(SUPPLEMENTING AND MODIFYING SPECIAL APPENDIX LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES OF CORPORATE PETITIONERS PURSUANT TO AMENDED RULE 28.1, RULES OF THE SUPREME COURT OF THE UNITED STATES)

The following changes in listings of corporate parent companies, subsidiaries (other than wholly owned subsidiaries), and affiliates, of the corporate petitioners should be noted. Otherwise, the parents, subsidiaries and affiliates are the same as [illegible] the "Special Appendix List of Corporate Subsidiaries and Affiliates of Corporate Petitioners pursuant to Amended Rule 28.1, Rules of the Supreme Court of the United States", previously filed herein.

Chace Oil Company: Chace Oil Company is a wholly-owned subsidiary of Cobb Resources Corporation, a New Mexico Corporation.

Tesoro Petroleum Corporation: Tesoro holds the previously listed subsidiaries; however, it now holds preferred stock and debentures of Corco convertible to common stock. If converted, Tesoro would own approximately 27.5% of the common stock of Corco.

Phillips Petroleum Company: In addition to the previous listing of subsidiaries and affiliates for Phillips Petroleum Company, the following are now included:

Acurex Solar Corporation
Chisholm Pipeline Company
Heat Transfer Research, Inc.
International Energy, Ltd.
Oil Insurance Ltd., (NEW)
Phillips Petroleum International Andina, S.A.
Salk Institute Biotechnology/Industrial Associates, Inc.
Texas Offshore Port, Inc.
Venezoil, C.A.

From the previous listing, the following are not now subsidiaries or affiliates:

Alyeska Enterprises, Inc.
LeeFac, Inc.
Powder River Corporation
Societe de Development des Polyolefins

Tenneco Oil Company: Houston Oil & Minerals Corporation is now a partially-owned subsidiary.

Getty Oil Company: Chisholm Pipeline Company is now a subsidiary. Blue Star Petroleum (Malta) Ltd. is not now a subsidiary.

Continental Oil Company (now Conoco Inc.): Conoco Inc. is now a wholly-owned subsidiary of E. I. DuPont de Nemours and Company. Conoco Inc. does not now own as subsidiary or affiliate Hudson's Bay Oil and Gas Company Limited or its subsidiaries previously listed at Page 5 of the Special Appendix.

APPENDIX

		PAGE
1.	Transcript of Argument by the Secretary of the Interior on hearing in *Southland Royalty Company* v. *The Navajo Tribe of Indians*, Civ. No. C-79-140 (D. Utah, March 13, 1980)	A-1
2.	Motion to dismiss, *Continental Oil Company* v. *Cecil D. Andrus*, Civ. No. 80-261C (D.N.M.)	A-5

IN THE

United States District Court

FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Before: THE HONORABLE BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE

Case No. C79-140
C79-153
C79-237
C79-296

Transcript of:
HEARING OF MOTIONS

SOUTHLAND ROYALTY COMPANY;
PHILLIPS PETROLEUM COMPANY, et al;
THE SUPERIOR OIL COMPANY, et al;
TEXACO INC., et al,

Plaintiffs.

v.

THE NAVAJO TRIBE OF INDIANS, et al,

Defendant.

March 13, 1980
Salt Lake City, Utah

APPEARANCES

For the Plaintiff:

SOUTHLAND ROYALTY COMPANY	JOHN CREER, ESQ. BRENT WARD, ESQ.
PHILLIPS, SHELL, CHEVRON	ALAN SULLIVAN, ESQ.
SUPERIOR OIL COMPANY	ARTHUR H. NIELSEN, ESQ.
TEXACO, INC.	RICHARD CAHOON, ESQ. BRUCE BLACK, ESQ. TOM EDWARDS, ESQ.
SECRETARY OF INTERIOR	JAMES CLEAR, ESQ.
UTAH BOARD OF OIL, GAS UTAH TAX COMMISSION	MICHAEL QUEALY, ESQ. FRANK NELSON, ESQ.

For the Defendant:

HAROLD CHRISTENSEN, ESQ.
MAX WHEELER, ESQ.

[TR.70]

THE COURT: Has not?

MR. CLEAR [for the Secretary of the Interior]: He has not.

THE COURT: Why not?

MR. CLEAR: Well, as I said last time, the Secretary feels that he has statutory authority to approve — or statutory responsibility to approve and disapprove certain things such as leases. This is clearly spelled out in the statutes. No lease shall be valid unless the Secretary approves it. In that situation, obviously, the Secretary has the responsibility to act either to approve or disapprove. In other cases, and I suspect the *Jicarilla Apache* case but I'm not sure, in the tribal constitution it is required that certain resolutions will not become effective unless approved by the Secretary. In that situation the Secretary exercises a responsibility to act, too, either to approve or disapprove a resolution.

THE COURT: Or he approves ahead of time by approving the constitution which defines the boundaries.

MR. CLEAR: Yes. Right. In other words, the constitution could say let us assume in 1935 a tribe came under the constitution and said no resolutions need be approved by the Secretary. Now, he could say I don't like it. I won't approve it unless you amend it to say it will be approved, which I suspect happened. But now the constitutions are being amended to take out the approval [TR.71] requirement. Many tribes are amending the constitution so it's less and less direct. There's no requirement under any statute or under the organization doctrines or practices of the Navajo tribe which requires Secretary approval for these resolutions. So, in effect, he has no authority to act either one way or the other and that is why he has not acted on these. Now, one resolution was submitted to the Secretary for approval. I think it was the possessory interest tax resolution,

and at that time he advised the tribe that the approval of the Secretary was unnecessary for the two reasons I've mentioned. But I think *Jicarilla* indicates that if the Secretary had approved this lease this case would be thrown out.

THE COURT: Well, you may be right. My query is why hasn't he done it?

MR. CLEAR: Well, I think I've explained that. There's no statutory requirement for him to approve or disapprove this [sic] lease. And the only basis you can sue the Secretary on is for failing to perform his statutory duty. In the absence of citation to any statute which requires him to act on this resolution, there's no claim against him.

THE COURT: The only thing I wonder about is if he's duty bound to approve a constitution under a reorganization act which defines the periphery of power in which [TR.72] the reorganized tribe is to operate, why doesn't that same requirement of approval relate to laws comparable in nature to those passed by a reorganized tribe by a so-called unorganized tribe.

MR. CLEAR: Well, I think it would be similar to a constitutional amendment versus an enactment of Congress, that is, a constitutional amendment has to be approved by three-quarters of the states. But an act of Congress does not have to be because the constitution changes the form of government. And I think the same logic would follow. The Congress could say the Secretary will oversee the tribe in adopting its constitution. But if he is satisfied that the tribe can exercise independently the powers given to it in the constitution, he can waive any requirement that the individual resolutions that the tribal council passes as statutes be approved by him. I think the same rationale applies. And, again, that power, the formal power of approval spelled out in the statute applies only to tribes organizing under the Indian Reorganization Act.

But even assuming that the *Jicarilla* case doesn't address the causes of action against the Secretary in this case, I don't think there's any reason for holding further proceedings on the claims

against the Secretary. Either *Jicarilla* mandates that they be dismissed, or *Jicarilla* is [TR.73] irrelevant to it. And if *Jicarilla* is irrelevant to the claims against the Secretary, I think the case against the Secretary can be decided on the pending motions. There's no need for a trial or even summary judgment motions because the only way this Court can review the Secretary's action is on the basis of the administrative record, and there's no administrative record because he hasn't taken any action.

But in a sense, *Jicarilla* does have — well, I think basically the claims against the Secretary in these cases are that he should have approved it because what the tribe did was outside its authority, outside the tribe's authority. And I think you take that premise as the claim against the Secretary, I think *Jicarilla* clearly indicates what the tribe did in this case was within its authority, and I think that kind of in a back door fashion removes the claims against the Secretary.

Finally, there was a discussion on the effect of the —

THE COURT: But the practical problem there, if it's within their authority and he's duty bound to approve it —

MR. CLEAR: He's not duty bound to approve it.

THE COURT: Well, assuming that, and he didn't approve it, then you've got a due process problem, haven't you?

United States District Court

FOR THE DISTRICT OF NEW MEXICO

Civil No. 80-261 C

CONTINENTAL OIL COMPANY,

Plaintiff,

v.

CECIL D. ANDRUS, ET AL.,

Defendants.

MOTION TO DISMISS

Jicarilla Apache Tribe, Intervenor herein, by and through its attorneys Nordhaus, Haltom & Taylor, respectfully moves this Court to dismiss the above-captioned cause on the following grounds:

1. The Jicarilla Apache Tribe is an indispensible party under Rule 19, FRCP, which the Plaintiff has failed to join;

2. The Court lacks jurisdiction over the Jicarilla Apache Tribe. The Jicarilla Apache Tribe is immune from suit, has not waived its sovereign immunity from suit and therefore cannot be joined even though an indispensible party.

3. Pursuant to Rule 12(b)(5) and Rule 12(b)(7) FRCP, Plaintiff's Complaint should be dismissed for lack of jurisdiction over Intervenor, Jicarilla Apache Tribe and for failure to join the Jicarilla Apache Tribe as an indispensible party.

4. The Court lacks jurisdiction of the subject matter as required by Rule 12(b)(1) FRCP. The matters raised in Plaintiff's Complaint have been decided in the following actions and are therefore res judicata:

Jicarilla Apache Tribe v. *Supron Energy Company, Southland Royalty Company, Exxon Company, USA, Gas Company of New Mexico, Southern Union Gathering Company, and Secretary of the Interior*, No. 75-247M, USDCDNM.

Jicarilla Apache Tribe v. *Continental Oil Company, Exxon Company, USA, Tenneco Oil Company, Atlantic Richfield Company, Amoco Production Company, Secretary of Interior, and Southland Royalty Company*, No. 76-430P.

5. Concurrence of opposing counsel has not been requested because of the nature of this Motion.

THEREFORE, the Jicarilla Apache Tribe moves this Court to dismiss this case for all the above reasons more fully explained in its Memorandum Brief filed herein.

NORDHAUS, HALTOM & TAYLOR

By s/ B. REID HALTOM
B. REID HALTOM
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Certificate of Mailing

We hereby certify that a copy of the foregoing Motion to Dismiss was mailed to opposing counsel of record this 26th day of August, 1981.

s/ B. REID HALTOM
B. REID HALTOM